No. 95-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOU McKENNA, Director, Ramsey County Department of Property Records and Review, and JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,

Petitioners,

v.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

May a state, consistent with the First and Fourteenth Amendments, prohibit a political party from nominating a fully qualified candidate of its choice, when the state's only objection is that the candidate is also the nominee of another party?

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BRIEF IN RESPONSE TO PETITION

In this case, the Eighth Circuit held that Minnesota's ban on multiple-party nominations works a severe and unwarranted burden on a minor political party's core First Amendment right to establish itself as a political party, "to select a standard bearer who best represents the party's ideologies and preferences," *Eu v. San Francisco County Democratic Central Commission*, 489 U.S. 214, 224-(1989) (internal quotation omitted), and to "broaden [its] base of public participation in and support for [its] activities," *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

A. Respondent Twin Cities Area New Party submits that the opinion below cogently and persuasively speaks for the correctness of that holding. Nonetheless, respondent agrees with petitioners that this case warrants review by this Court. In this response, we therefore add the following comments regarding why we believe the Court should exercise its discretionary review authority.

First, the Eighth Circuit's opinion is, as petitioners state, in direct and irreconcilable conflict with the Seventh Circuit's opinion in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), which upheld a similar ban on multiple-party nominations. The internal division in *Swamp* further demonstrates the discord in the lower courts on the constitutional question presented here. The three-judge panel could not agree on a single rationale why the ban was valid, and Judges Posner, Easterbrook and Ripple issued an opinion dissenting from the denial of rehearing *en banc* which forcefully rejected the majority and concurring analyses as inconsistent with the standards established by this Court.

Second, the decision below does, as petitioners also state, call into question the validity of similar election laws in some 40 states.

Third, litigation on the constitutional issue here is already pending and likely to recur. See, e.g., *Patriot Party of Allegheny County v. Allegheny County Department of Elections*, No. 95-3385 (3d Cir.)(argued 28 March 1996); *The Green Party of New Mexico v. Gonzalez*, Civ. No. 96-439 BB/JHG (D.N.M.).

There is, we recognize, always a question of judgment as to when the process of litigating elucidation has run its course. But given the conflict in the circuits, and the importance of the constitutional issue, we submit that little would be gained by postponing review.

Finally, at a time of growing citizen disquiet with the rigidities of an entrenched two party system, and the deleterious effects of that system on effective political action and the responsiveness of elected representatives to their electors, the prompt and authoritative resolution of this issue has particular urgency.

B. While *certiorari* papers are not the proper place to debate sensitive constitutional questions in depth, two points that clarify the substantive disagreement between the parties are, we believe, in order.

The petition argues that Minnesota's ban on a multiple-party nomination is constitutional as only a modest regulation of political candidates. This is not, however, a case about the right of *individuals* to choose their parties; it is about the right of *political parties* to choose their candidates.

Precisely for this reason, petitioners' effort to bring this case within this Court's ruling in *Storer v. Brown*, 415 U.S. 714 (1974), must fail. *Storer* involved a California "disaffiliation" statute that prohibited independent "sore loser" candidacies by individuals who had been members of a major party for a certain period of time prior to the major party primary. *Storer* thus concerned the rights of individuals to run as independent *candidates*, not the associational rights of *parties* to chose their nominees. This Court's decisions

recognize that an individual's right to be a candidate is simply not on a constitutional par with a party's right to choose its own candidates. *See Clements v. Fashing*, 457 U.S. 957, 963-65 (1982)(plurality opinion); *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134, 143 (1972). In light of this distinction, it follows that *Storer* does not speak to the question presented here.

CONCLUSION

For these reasons, respondent does not oppose the petition for certiorari.

Respectfully submitted,

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